Filed 2/24/05 Kaplan v. Breslow CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RAYMOND S. KAPLAN, Plaintiff and Appellant, v. WARREN L. BRESLOW, Individually and as Trustee, etc., et al., Defendants, and Appellants; MARINA EAST HOLDINGS PARTNERSHIP et al., Defendants and Respondents.	B162063, B165532 (Los Angeles County Super. Ct. Nos. BC146720, SC042364)
JONA GOLDRICH et al., Plaintiffs and Appellants, v. RAYMOND S. KAPLAN, Defendant and Appellant.	

APPEALS from a judgment and order of the Superior Court of Los Angeles County. Michael Harwin, Judge, and Edward Panelli, Retired Associate Justice of the Supreme Court, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.). Affirmed.

Law Office of Joseph L. Golden, Joseph L. Golden; Marcin Barerra & O'Connor, John B. Marcin for Plaintiff, Defendant and Appellant Raymond S. Kaplan.

Steven R. Friedman for Plaintiffs, Defendants and Appellants Wasrren L. Breslow, Jona Goldrich, Jerome Snyder, Sol Kest, Milton Swimmer, Channel Gateway, L.P., Snyder Marina Enterprises.

Howard M. Fields for Defendants and Respondents Marina East Holdings Partnership and Alan E. Robbins.

The parties are the beneficial owners of 16 acres of real property located in Marina Del Rey. The key issue in these related appeals is whether as a result of a 1995 amendment to one partnership agreement (the Channel Gateway L.P. real estate partnership [Channel Gateway]), another partnership (the WLB-RSK Venture partnership [Venture]), whose partners are Warren Breslow and Raymond Kaplan, was deprived of a 15% partnership interest in Channel Gateway.

We conclude that summary judgment was properly granted against Kaplan because, inter alia, the Venture partnership and not Kaplan is the real party in interest, resulting in Kaplan's lack of standing, and Venture still retains a 15% limited partnership interest in Channel Gateway. As to the cross-appeal by Breslow and related parties (collectively referred to as the Breslow plaintiffs)[1] on their legal malpractice and related claims against attorney Kaplan, which resulted in a jury verdict in favor of Kaplan, we find no reversible error from improper appeals to passion or prejudice or from alleged evidentiary errors. Also unavailing are the contentions that the trial court erred in denying the motions for a new trial and for judgment notwithstanding the verdict. Finally, Kaplan's related appeal challenging the award of attorney fees and costs is without merit.

FACTUAL AND PROCEDURAL SUMMARY[2]

The parties involved in the litigation

The Channel Gateway partnership, which owns the 16 acres of Marina Del Rey real property, was formed in 1989. Channel Gateway's general partners are Snyder Marina Enterprises (SME) and Jerome H. Snyder, who was the managing general partner until 1995 when SME assumed that role.

Kaplan sued SME's general partners and their trustees. SME's general partners are Snyder, Milton I. Swimmer and three trusts, the Jona Goldrich Trust No. 1 (of which Jona Goldrich is trustee), the Warren Breslow Trust (of which Warren Breslow is trustee), and the Sol Kest Trust No. 1 (of which Sol Kest is trustee). SME's limited partners include each of the five general partners, as well as Kaplan.

Kaplan also sued Channel Gateway's limited partners. Channel Gateways' limited partners are Marina East Holding Partnership (MEHP), a general partnership primarily owned and controlled by Alan E. Robbins, and Venture, which is the general partnership between Breslow and Kaplan.

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1 The plaintiffs in the jury trial on the cross-complaint against Kaplan were Warren Breslow, Jona Goldrich, Sol Kest, Jerome Snyder, and Milton Swimmer.

2 This summary is drawn largely from the facts in the findings of fact by the referee, Hon. Edward A. Panelli (Ret.), who granted summary judgment against Kaplan.

MEHP and Venture each own a 15% limited partnership interest in Channel Gateway. Kaplan and Breslow, who Kaplan also sued, each own a one-half interest in Venture. Venture is not a party in this litigation.

Kaplan's effort to foreclose on MEHP's limited partnership interest in Channel Gateway

In 1989, not long after MEHP contributed the Marina Del Rey real property to Channel Gateway, MEHP obtained a $2.6 million loan from Sumitomo Bank. MEHP secured the loan with its limited partnership interest in Channel Gateway. Goldrich and Snyder guaranteed the loan. As additional collateral, MEHP assigned its interest in Channel Gateway to Sumitomo. In 1990, Robbins personally borrowed an additional $3.8 million from Independence Bank and assigned his interest in MEHP as collateral for the loan.

In July of 1991, when the Sumitomo bank loan was due, MEHP failed to repay it. But Snyder and Goldrich paid Sumitomo the balance of approximately $2.5 million pursuant to their guarantees. In exchange, Snyder and Goldrich received an assignment of Sumitomo's security interest in MEHP's limited partnership interest in Channel Gateway. Kaplan, an attorney who had represented Snyder and his various real estate entities for years, negotiated and drafted the documents on behalf of Goldrich and Snyder in connection with the payment of the Sumitomo loan and the assignment of MEHP's limited partnership interest.

On July 17, 1991, the day Goldrich and Snyder paid Sumitomo's loan to MEHP, Kaplan scheduled a foreclosure sale of MEHP's limited partnership interest in Channel Gateway. Independence Bank, the second lien holder, immediately objected to the manner and method of the attempted sale. The possibility of a sale was stayed as a result of MEHP's Chapter 11 filing. However, Kaplan scheduled a second foreclosure sale for July 28, 1992, on the ground that Snyder and Goldrich were secured parties under the Commercial Code.

<u>MEHP and the FDIC sue to enjoin and void the foreclosure sale of MEHP's limited interest in Channel Gateway</u>

On the day of the scheduled foreclosure, MEHP filed an action in the superior court for declaratory and injunctive relief against Snyder, Goldrich, Channel Gateway and others, seeking to set aside the purported noticed sale of its limited partnership interest in Channel Gateway. MEHP obtained a temporary restraining order prohibiting the sale of MEHP's interest and an injunction requiring the posting of a $1.3 million bond by September 8, 1992. MEHP was unable to post the bond, and the temporary restraining order expired. The FDIC then sought a continuance of the bond requirement and the temporary restraining order due to the foreclosure of Independence Bank's interest in Channel Gateway.

However, on September 9, 1992, a purported foreclosure of MEHP's limited partnership interest occurred at a private sale. Kaplan prepared the notice of sale containing a $7 million offset. The only bidder at the sale was Venture, the partnership Kaplan had previously formed and into which he had put no money for his 50% share in the partnership.

Kaplan prepared the documents to effectuate the private sale of MEHP's limited partnership interest to the Venture partnership. The documents purported to do the following: transfer MEHP's 15% limited partnership interest to Venture; amend the Channel Gateway partnership agreement to reflect this transfer; and obligate Venture to pay Snyder and Goldrich $900,000 for MEHP's limited partnership interest pursuant to a promissory note payable in five years (hereinafter, the Venture note). No payments were ever made on the Venture note.

On September 9, 1992, Kaplan also prepared an assignment of interest in the limited partnership; i.e. an indemnification agreement. The indemnification agreement purported to defend and indemnify Kaplan in connection with litigation over the commercial reasonableness of the foreclosure of MEHP's limited partnership interest and Venture's acquisition of a limited partnership interest in Channel Gateway. Kaplan also prepared an agreement that provided in the event of a default on the Venture note, Snyder would pursue only Kaplan, and Goldrich would pursue only Breslow.

Regarding the $3.8 million Independence Bank loan by Robbins in 1990 with his interest in MEHP as collateral, Robbins pled guilty to federal bank fraud in connection with that loan and agreed to make full restitution of the loan amount to the FDIC, as receiver for Independence Bank. In July of 1994, the FDIC filed an action in federal court to enforce its rights to the collateral on the Independence Bank loan and to set aside the purported foreclosure sale to Venture.

In the FDIC federal lawsuit, the FDIC claimed that MEHP maintained its ownership interest in Channel Gateway and that the purported foreclosure and sale of MEHP's interests were void or voidable. The FDIC raised various legal issues, including that the sale of MEHP's interests had not been conducted in a commercially reasonable manner and had violated fraudulent conveyance laws. In February of 1995, a federal district court judge granted the FDIC's application for a preliminary injunction, finding a strong likelihood of the FDIC's success on the merits.

<u>The parties settle the litigation matter and amend the Channel Gateway partnership agreement</u>

In light of the federal district court judge's findings, in July of 1995, all of the parties except Kaplan executed a settlement agreement and mutual release (hereinafter, the 1995 settlement agreement) to settle the various disputes arising out of the foreclosure of MEHP's partnership interest. The 1995 settlement agreement expressly incorporated and attached a 1995 amendment to the Channel Gateway limited partnership agreement. These two integrated agreements, each a condition of the other, reinstated MEHP's limited partnership interest and adjusted the rights and obligations of the parties with respect to the future affairs of Channel Gateway (excluding Venture).

The 1995 amendment to the settlement, provided, in pertinent part: "The 1992 Purported Sale [of MEHP's limited partnership interest in the partnership to Venture] is . . . acknowledged to be null and void as set forth herein and the 1992 Amendment will cease to be of any future force or effect upon the effectiveness of this Amendment."

According to Kaplan, by agreeing to the above provision, Breslow violated the Venture partnership agreement and made it impossible for Venture to continue the business for which Kaplan and Breslow had agreed it would be formed. However, Kaplan, the other partner with Breslow in Venture, did not sign the 1995 amendment to the settlement agreement.

Kaplan files a series of actions challenging the 1995 settlement agreement

After the 1995 settlement agreement, Kaplan simultaneously filed two similar lawsuits, one in federal court and the other in state court. Both actions sought to invalidate the 1995 amendment to the Channel Gateway limited partnership agreement. The federal district court judge dismissed Kaplan's federal suit; Kaplan unsuccessfully appealed the dismissal. Kaplan thereafter filed a third action, one in the United States Court of Claims alleging the same facts and wrongs alleged in the two prior actions.

Regarding Kaplan's state court action, which is under review in the present appeal, after consolidation of related cases, Kaplan filed his second amended complaint in February of 2000. The second amended complaint alleged causes of action for declaratory relief establishing the invalidity and unenforceability of the 1995 amendment to the Channel Gateway partnership agreement, inducement to breach contract, breach and conspiracy to breach fiduciary duties, breach of indemnity contract, an injunction, and a judicial declaration that the Venture partnership had been dissolved as of August 10, 1995, or on another appropriate date. Kaplan also sought reasonable attorney fees and costs pursuant to the contractual terms of November 1988 limited partnership agreement.

Breslow and other defendants moved for summary judgment, or alternatively summary adjudication, alleging, in pertinent part, (1) that Venture, not Kaplan, was the real party in interest, (2) that Kaplan's failure to comply with Probate Code section 16004, subdivision (c)[3] and the Rules of Professional Conduct, rule 3-300[4] rendered any agreements with Kaplan void. In March of 2001, the parties agreed to a judicial reference, and Justice Edward A. Panelli (ret.) was appointed referee to hear the motion.

Justice Panelli granted summary judgment against Kaplan, ruling that he lacked standing to maintain a lawsuit against Breslow and related defendants. Kaplan's lack of standing to maintain the claims set forth in the second amended complaint is based on the fact that Venture, not Kaplan, is the real party in interest, and only Venture has standing to complain that its interest in Channel Gateway was compromised. The second amended complaint alleged that Venture, as opposed to Kaplan himself, was deprived of a 15% limited partnership interest in Channel Gateway and was removed and replaced as limited partner in Channel Gateway as a result of the 1995 amendment to the Channel Gateway limited partnership agreement.

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[3] Probate Code section 16004, subdivision (c) provides as follows: "A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee."

[4] Rules of Professional Conduct, rule 3-300 (rule 3-300) provides as follows: "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition." (See also *Fletcher v. Davis* (2004) 33 Cal.4th 61.)

As further explained by Justice Panelli in his order granting summary judgment, Venture was not a plaintiff or even a party to Kaplan's lawsuit. And as indicated in the Venture partnership agreement, Venture could act only with the consent of both partners (Kaplan and Breslow), and Breslow had not and would not consent to this lawsuit or any action to invalidate the 1995 settlement agreement or the 1995 amendment. Breslow would not give such consent because all parties, except Kaplan, agree that Venture retained its 15% limited partnership interest.

Kaplan nonetheless urged that he had standing to maintain the lawsuit against Breslow and the other defendants because he was a liquidating partner. Justice Panelli reasoned, however, that Venture had not been dissolved and could not be dissolved without Breslow's consent, and that Breslow in effect expressed his will not to dissolve Venture by refusing to join Kaplan's lawsuit. Moreover, although Kaplan's tenth cause of action sought a judicial declaration that Venture had been de facto dissolved because of the 1995 amendment, Kaplan never filed a proper application for dissolution as contemplated by the Corporations Code. Indeed, the court observed that Kaplan had presented no evidence that dissolution was warranted, as there was no indication the economic purpose of Venture had been frustrated and no evidence Breslow had somehow rendered it not reasonably practicable to carry out the partnership's business.

Justice Panelli concluded that the Venture partnership had not been dissolved by operation of law, that Kaplan was not the liquidating partner and had no authority to wind up the partnership affairs, and that Venture was a valid and existing partnership. Moreover, Venture owned a 15% limited partnership interest in Channel Gateway, had not been removed or replaced as a limited partner in Channel Gateway, and Kaplan lacked standing to pursue any of the causes of action in the second amended complaint because he is not a real party in interest.

In addition to granting summary judgment in favor of the Breslow parties, Justice Panelli also granted summary judgment in favor of MEHP and Robbins. Justice Panelli granted summary judgment in favor of MEHP and Robbins and against Kaplan, again, because Kaplan lacked standing to pursue his claims since he was not the real party in interest, as previously discussed. He also based the summary judgment on the grounds that (1) discretionary settlement decisions by federal entities, such as the FDIC in its involvement in the 1995 settlement, are by federal statute not subject to judicial review, and (2) Kaplan's causes of action in state court are substantially identical to those unsuccessfully litigated in the federal action and are thus barred by res judicata and/or collateral estoppel.

Following summary judgments against Kaplan, defendants Goldrich and Snyder, the holders of the note in question and the parties to the indemnity agreement, filed a memorandum of costs and motions for the award of reasonable attorney fees and costs. Kaplan opposed the motion, alleging in part that defendants were not entitled by any contract provision to attorney fees and that they were not the prevailing parties.

After several hearings, the trial court granted attorney fees in the amount of \$303,172.50, which was \$25,833.25 less than the amount requested. The trial court also denied Kaplan's motion to tax costs of defendants Robbins and MEHP, but granted in part Kaplan's motion to tax costs of defendants Goldrich, Breslow, Snyder, Kest, Swimmer, Channel Gateway and SME (by reducing deposition fees to \$2,212.95 and by directing that the cost of the referee be borne equally by both sides).

Kaplan appeals from entry of judgment against him following summary judgment and from the orders awarding attorney fees and denying motions to tax costs.

The cross-complaint for legal malpractice

Breslow and other related parties filed a cross-complaint against Kaplan, alleging legal malpractice and related causes of action arising out of the 1992 private foreclosure sale and seeking to void Kaplan's partnership interests in SME and Venture. In essence, the Breslow plaintiffs alleged that while Kaplan acted as an attorney on their behalf, he entered into a business transaction with clients (Snyder and Goldrich), failed to advise the clients of the potential conflict of interest, and breached his fiduciary duty to the clients. The Breslow plaintiffs further urged that the business transaction was unfair and unreasonable to the client, and that all documents prepared and/or signed by Kaplan should be deemed voidable by the client, as they resulted from Kaplan's conflicts of interest and breaches of fiduciary duty.

Specifically, the Breslow plaintiffs' case focused on Kaplan's alleged violation of the rules governing the professional conduct of attorneys.[5] They presented evidence at a jury trial in support of their theory that Kaplan acted as an attorney during various transactions in 1992 when he obtained an interest in his clients' partnership through a scheme involving the foreclosure of an intangible partnership interest. Purportedly without complying with the rules of professional conduct, Kaplan obtained 50% of a partnership owning an undivided 15% limited partnership interest in $100 million Marina Del Rey construction project that belonged to his clients.

Kaplan never paid any money for the interest in the partnership he obtained. As asserted by the Breslow plaintiffs, the promissory note drafted by Kaplan was the only consideration for the acquisition by Kaplan's entity. The note called for no payment of any kind for five years, and then granted Kaplan the right either to return the interest (keeping $3.6 million of tax benefits) to his clients Snyder and Goldrich in full satisfaction of the of the debt, or to pay the note. Kaplan neither returned the interest nor paid the debt.

However, he then acquired an interest in the partnership through a private foreclosure sale. He did so by advising Snyder and Goldrich to sell their 15% interest at a private foreclosure sale to Venture (Kaplan's entity in which he had a 50% interest with Breslow). That extinguished the junior lien held by Independence Bank, but also exposed all involved in the sale to claims of fraud and fraudulent transfer. Kaplan, however, insulated himself from risk, at the expense of those he allegedly represented as

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5 It is sufficient here to briefly summarize the facts adduced at trial and the positions taken by the parties. Further detailed discussion of the facts is reflected in the discussion section of the opinion herein, as is appropriate to the contentions raised.

clients, through an indemnity agreement to the potential disadvantage of Snyder and Goldrich.

Kaplan's defense at trial was that when engaging in the conduct complained of in 1992 he was not acting as an attorney for any of the Breslow plaintiffs. Rather, Kaplan was acting in his capacity as a real estate developer and business partner. Kaplan testified, for example, that Snyder told him he was coming over to Snyder's company to be his partner, not his lawyer. Stationery and business cards were prepared that listed him as a partner of the company and did not indicate he was its general counsel or even an attorney. And Kaplan asserted he performed tasks a nonattorney in a real estate development company would do, and that Snyder taught him about real estate development.

Moreover, Snyder acknowledged that the legal services rendered by Kaplan to which Snyder had testified on direct examination had been rendered for "the various partnership entities" in which Snyder was involved. And Snyder relied on legal advice other than from Kaplan regarding the defense of the FDIC and MEHP litigation. According to Kaplan, virtually all of the approximately 89 exhibits relied upon by Snyder to establish legal service by Kaplan related to partnerships rather than Snyder individually, or were created for partnerships of which Kaplan was a member, or were not legal documents, or were prepared long before or after the 1992 transaction.

Kaplan also presented at trial a statute of limitations defense. Kaplan thus urged that any complaint about any benefit or partnership interest he obtained, or about any of his legal advice or actions, or about the sale of the MEHP interest to Venture in 1992 was barred by the statute of limitations.

The jury returned special verdicts, which specifically found in Kaplan's favor. The jury accepted Kaplan's defenses that he was not engaged in acting as an attorney regarding the conduct complained of. The jury also found that the statute of limitations barred any complaints about the benefit or partnership interest Kaplan obtained, or about his advice or actions regarding the transactions at issue, or the breach of any fiduciary duties, or any negligent or intentional misrepresentations by Kaplan. The jury further found that Kaplan had not breached any fiduciary duty or committed any intentional or negligent misrepresentation regarding the Breslow plaintiffs, and that no negligence or wrongful conduct by Kaplan caused any loss or damage to the Breslow plaintiffs.

DISCUSSION

I. Kaplan's appeal following summary judgments

Reviewing this matter in accordance with the customary rules of appellate review following summary judgment (Code Civ. Proc., § 437c, subd. (c); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843-857), we conclude that summary judgments were properly granted against Kaplan because, inter alia, he lacked standing. Venture, and not Kaplan, was the real party in interest and the only entity that could have properly brought suit.

Kaplan, in his individual capacity, lacks standing to sue for any alleged injury to the partnership

The well-established general rule is that "every action must be prosecuted in the name of the real party in interest." (Code Civ. Proc., § 367; see *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1040-1041.) In the case of a partnership, the real party in interest is the partnership itself, rather than a partner. (Code Civ. Proc., § 369.5, subd. (a).) "Individual partners may not sue for damage to the partnership property or to their individual 'beneficial interest' in the property." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 2:15.5, p. 2-9.) This restriction exists because it is the partnership, rather than the individual partners, which holds title to the assets and claims of the partnership. (See *Mayer v. C. W. Driver* (2002) 98 Cal.App.4th 48, 59-60; *Bartlome v. State Farm Fire & Casualty Co.* (1989) 208 Cal.App.3d 1235, 1239-1240.)

In the present case, Venture, not its partners (Kaplan and Breslow), owns the 15% interest in Channel Gateway. The basis for Kaplan's claims is that the 1995 settlement agreement and amendment purportedly stripped Venture of its interest in Channel Gateway. Venture is thus indisputably the alleged wronged party, and not either of its individual partners. Kaplan is thus an improper plaintiff, and summary judgments were properly granted against him on that basis.

Kaplan argues that he is entitled to bring suit in his individual capacity because Venture was automatically dissolved by operation of law--without the necessity of a formal judicial decree--when Kaplan's partner, Breslow, entered into the 1995 settlement agreement and amendment. According to Kaplan, pursuant to the statutory scheme then in existence,[6] the partnership dissolution was caused either (1) "by the express will of any partner at any time," or (2) by an "event which makes it unlawful for the business of the partnership to be carried on . . . ." (Former Corp. Code, § 15031, subds. (2) & (3).) Kaplan relies on the above quoted statute and urges that Breslow essentially attempted to "wreck" the partnership (see *Moropoulos v. C.H. & O.B. Fuller Co.* (1921) 186 Cal. 679, 687) by entering into the 1995 settlement agreement and amendment.

Kaplan emphasizes that the 1995 amendment to the settlement, which he did not sign, declared: "The 1992 Purported Sale is, pursuant to the Settlement Agreement . . . acknowledged to be null and void as set forth herein and the 1992 Amendment will cease to be of any future force or effect upon the effectiveness of this Amendment." Kaplan thus argues that by agreeing to the above provision, Breslow violated the Venture partnership agreement and made it impossible for Venture to continue the business for which Kaplan and Breslow had agreed it would be formed. Kaplan also notes that the Venture partnership agreement requires for any action the written agreement of both partners, and argues that he never signed any document agreeing that Venture would

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6 We note that the Uniform Partnership Act, Corporations Code sections 15007 et seq., was repealed by Statutes of 1996, chapter 1003, section 1.2, operative January 1, 1999, and replaced by the Uniform Partnership Act of 1994, Corporations Code sections 16100 et seq. However, the prior statutory scheme governs here, as Venture was formed and its rights accrued before the effective date of the current Uniform Partnership Act of 1994. (Corp. Code, § 16112.)

accept any interest in the partnership other than the one it acquired in 1992 and purportedly taken away in 1995.

Kaplan thus contends that the dissolution statute was triggered when Breslow executed agreements (without the signature of the other partner, Kaplan) that purportedly eliminated Venture's only asset, provided that Venture never could become a limited partner, and executed the MEHP settlement agreement that required him to indemnify MEHP and Robbins against any claims that Kaplan or Venture might make against them. Kaplan also argues that Breslow refused to allow Venture's lawyers to represent the partnership in litigation then pending against it after the 1995 settlement agreement, and that it was for the jury to decide whether those action expressed Breslow's will that the partnership no longer conducted the business for which it was formed.

Kaplan's position is without merit for two reasons. First, his argument is based on the erroneous premise that Venture lost its 15% interest in Channel Gateway as a result of the 1995 settlement agreement and amendment and thus defeated the purpose of the Venture partnership. As stated in the Venture partnership agreement drafted by Kaplan, "the purpose of the Partnership shall be to acquire a fifteen (15%) interest as a limited partner in Channel Gateway, L.P." That purpose was accomplished, as it did acquire "a" 15% interest. Kaplan merely complains that the partnership thereafter purportedly lost that interest, although the partnership agreement specifically provided for sharing both profits and "losses." Most significantly, however, Justice Panelli properly concluded based on uncontroverted facts, that Venture had not in fact lost its 15% interest.

Second, if grounds existed for dissolution of the Venture partnership, it could not occur automatically by operation of law, as Kaplan assumes. Rather, such dissolution could occur only as a result of a judicial decree, which Kaplan has not sought by proper *application* pursuant to the requirements of the Corporations Code.

<u>Venture still retains a 15% limited partnership interest in Channel Gateway.</u>

Notwithstanding the 1995 settlement agreement and amendment, Venture still retains a 15% limited partnership interest in Channel Gateway. Words in an agreement to which Kaplan and Venture were not parties could not have the adverse effect urged by

Kaplan. It is well settled that an attempt to modify or reduce a partnership interest is ineffective to change that interest without the consent of the affected partner. (*Miller v. Rau* (1963) 216 Cal.App.2d 68, 75.) Here, the "words" complained of by Kaplan were never translated into any action adverse to Venture, Kaplan, or Breslow.

Prior to the 1995 settlement agreement and amendment, Venture owned a 15% limited partnership interest in Channel Gateway, with a capital account of $900,000 that increased to account for distributions to Venture. After the 1995 settlement agreement and amendment, it still owned the same interests. Moreover, after 1995 Kaplan continued to receive (through Venture) the appropriate tax benefits due to Venture's 15% limited partnership interest in Channel Gateway, and such tax benefits continued until exhausted.

When the 1995 settlement agreement was entered into, all the parties recognized that Venture would still retain a separate 15% partnership interest in Channel Gateway, even though MEHP was recognized as the limited partner it always had been. After the 1995 settlement agreement, both Venture and MEHP each held 15% interests in Channel Gateway. Since Venture holds such a 15% interest, no conduct by any party related to the 1995 settlement agreement and amendment could possibly have resulted in Venture's dissolution.

Documentary evidence, as well as the declarations of pertinent parties, supports this conclusion. For example, an independent CPA's work sheet used to prepare the tax returns for Channel Gateway in 1997 specifically indicated the percentages of ownership interests and specified "15%" to Venture, followed by computation of the amounts allocated to Venture. This contemporaneous business record by an independent CPA, thus reflected Venture's continued viability as a partnership with the critical 15% share, even two years after the 1995 settlement agreement.

Similarly, correspondence between Kaplan and the partnership's tax attorney (Bruce Levine, Esq.) again confirms Venture's 15% share. In November of 1997, two years after Kaplan alleged in the federal district court and the superior court that the entire 15% interest had supposedly been lost, Levine responded to Kaplan's request to claim additional tax deductions based on Venture's *possession* of the 15% interest. And then Kaplan replied to Levine, explaining in a letter that based on Kaplan's 50% interest in Venture and Venture's 15% interest in Channel Gateway, Kaplan was entitled to "a full 7-1/2% allocation," and that Breslow was also entitled to the same allocation.

The continued existence of Venture's 15% share is likewise supported by declarations from Snyder, Goldrich, Swimmer and Breslow. Every partner (except Kaplan) agreed that the error in excluding MEHP from Channel Gateway had to be corrected, that the settlement would not affect the rights of Venture, and that Venture and Kaplan were to be treated the same as before the settlement. Kaplan was advised that the partners would settle around his interest, and that therefore Venture would remain a limited partner of Channel Gateway. Breslow, the other partner in Venture, was directed at a meeting to instruct the accounting firm to continue to treat Venture as a 15% limited partner in Channel Gateway.

As Goldrich indicated, he and the other partners advised Breslow that Venture's 15% interest in Channel Gateway would remain protected, and that MEHP would be recognized as the partner it had always been, since the sale was improper. Goldrich further declared that none of the partners of Channel Gateway had ever taken any action that would destroy Venture's interest, and no partner ever objected to Venture's interest being protected.

Significantly, Breslow, who had first-hand knowledge from dealing with Kaplan as his partner in Venture, declared that they both knew that the interest of Venture would remain protected regarding the 1995 settlement agreement and amendment to the Channel Gateway partnership. Breslow specifically advised Kaplan, both orally and in writing, that Venture was protected and would retain its 15% interest as a limited partner in Channel Gateway. Breslow also advised the partners in Channel Gateway to inform the attorneys and accountants that Venture was to be treated as fully retaining its rights.

Accordingly, based on the above uncontradicted declarations and documentary evidence, Venture possesses a 15% partnership interest in Channel Gateway.

<u>The grounds for dissolution urged by Kaplan could not result in dissolution by operation of law, but rather require a judicial decree, which was not properly sought.</u>

Kaplan's dissolution theory is also without merit because the terms of the dissolution statute do not permit one partner to unilaterally declare that the other partner caused a dissolution under the circumstances alleged, and to declare dissolution automatically in effect as a matter of law. As Justice Panelli properly concluded, Kaplan failed to make an application for dissolution as contemplated by the Corporations Code.

The common theme of all the "automatic" dissolution events enumerated in former Corporations Code section 15031 is that the events are unequivocal and readily susceptible to objective determination. They leave little room for argument about whether the events actually occurred. For example, the arrival of a termination date for the partnership, the death of a partner, the bankruptcy of a partner or the partnership, or the issuance of a judicial decree of dissolution (former Corp. Code, § 15032) are objective and easily ascertainable.

In contrast to those situations, Kaplan proposes a broader rule of automatic dissolution vaguely triggered by "events which are incompatible with the continuation of the business for which the partnership has been formed." Apart from the subjective and open-ended nature of Kaplan's approach and the problem it causes by making partnerships constantly susceptible to claims of dissolution, it is not the law.

The dissolution events in former Corporations Code section 15031 that are subject to interpretation or argument and are not objective--and thus not are not "automatic"--require a dissolution action. Thus, contrary to Kaplan's assertion, a dissolution action would be appropriate to determine whether dissolution was caused by an "event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership." (Former Corp. Code, § 15031, subd. (3).) Indeed, the current Corporations Code section 16801, subdivision (5), describes somewhat similar circumstances for dissolution and specifically requires "a judicial determination."[7]

Kaplan's second basis for automatic dissolution, the "express will of any partner" in contravention of the partnership agreement (former Corp. Code, § 15031, subd. (2)), is also without merit. Justice Panelli properly found that by refusing to join any of Kaplan's lawsuits, Breslow had expressed his will not to dissolve or otherwise end the Venture partnership because of the 1995 agreement and amendment or otherwise. To the extent the significance of any of Breslow's conduct is subject to dispute, his "express will" could not result in automatic dissolution, but would have to entail a judicial determination of dissolution. (See former Corp. Code, § 15032.)

Yet, as Justice Panelli aptly found, "Kaplan has not sued for dissolution, but only for a declaration that the actions of Breslow dissolved Venture as of August, 1995." As Kaplan admits, "Neither of [his] lawsuits sought Venture's dissolution; they sought to vindicate its rights." Moreover, although the trial court warned Kaplan after his initial complaint that he had failed to properly plead the necessary cause of action for dissolution of Venture, Kaplan nonetheless filed a second amended complaint which again did not contain allegations for dissolution of Venture.

As the court held in *Sager v. Estergren* (1937) 18 Cal.App.2d 382, 384, "where a decree of dissolution is not sought the court may grant no relief of a sort which depends upon a dissolution by the parties or by decree. The complaint should have been amplified so as to leave no doubt as to the nature of the relief which was applied for." Particularly

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[7] Corporations Code section 16801, subdivision (5), provides that a partnership may be dissolved "[o]n application by a partner, [and] *a judicial determination* that any of the following apply: [¶] (A) The economic purpose of the partnership is likely to be unreasonably frustrated. [¶] (B) Another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner. [¶] (C) It is not otherwise reasonably practicable to carry on the business in conformity with the partnership agreement." (Italics added.)

since Kaplan acknowledged that his lawsuit did not seek Venture's dissolution, the trial court did not err in denying such relief.

Accordingly, summary judgments were properly granted against Kaplan.[8]

II. The Breslow plaintiffs' cross-appeal following the jury's verdict against them on their legal malpractice and related claims against Kaplan

The Breslow plaintiffs raise several contentions focusing on the purported unfairness of the trial of their various legal malpractice and related claims against Kaplan. We find their contentions unavailing.

No reversible error from defense counsel's alleged improper appeals to passion, prejudice or sympathy by mention of the wealth of the Breslow plaintiffs.

Repeated references to a defendant's immense wealth or poverty generally constitute prejudicial misconduct. (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 14.) "Justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case." (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552-553.)

The Breslow plaintiffs contend that Kaplan's counsel deliberately attempted to appeal to the social or economic prejudices of the jury by emphasizing wealth of the Breslow plaintiffs and portraying the litigation in terms of a courtroom battle between the

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[8] In view of the grounds supporting summary judgment discussed above, it is unnecessary to discuss other additional grounds also supporting summary judgment. Thus, for example, it is unnecessary for this court to address the following: whether Kaplan failed to establish any damages; whether Kaplan is judicially estopped from taking his current position on appeal because he took the position in an involuntary bankruptcy petition against Venture that Venture existed and thus had not been dissolved; whether the doctrine of res judicata precludes Kaplan's claims here because similar claims were dismissed by the federal district court; and whether discretionary settlement decision by federal entities, such as the FDIC in its involvement in the 1995 settlement agreement, are by federal statute not subject to judicial review.

"little guy" versus the "big powerful guy." For the reasons discussed below, we find the complaints about reference to a party's wealth do not warrant a reversal and a new jury trial.

At the outset, the trial court granted a motion in limine to preclude the mention of the wealth or financial status of any of the parties, including Kaplan. The Breslow plaintiffs note several instances where this ruling was allegedly violated. For example, during jury voir dire, Kaplan's counsel asked a prospective juror--without objection from opposing counsel--whether the juror had ever seen a situation where a person thinks he has a good cause and stands up for what he believes in the face of overwhelming odds or an overwhelming entity. However, we find that this unobjected to question was not a specific reference to wealth or economic status, but rather just a focus on what counsel perceived as his client's adherence to principle despite the odds.

The Breslow plaintiffs also complain about the court's permitting the use of several photographs of Snyder's complex development projects, which were not at issue in the case. The trial court, however, did not abuse its discretion or otherwise err in permitting such as evidence, as it noted that Snyder had put his sophistication at issue by testifying that he had only achieved a high school diploma.

However, the court did sustain the objection to questioning Snyder about whether Snyder's company was "a one billion dollar enterprise." As the court properly ruled, "a certain amount" of questioning related to Snyder's business sophistication and acumen was proper, but not "the billion dollar stuff." We find the court properly granted Kaplan's counsel reasonable latitude in his cross-examination. (See *Curry v. Superior Court* (1970) 2 Cal.3d 707, 715; *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507.)

Similarly, the Breslow plaintiffs complain on appeal about Kaplan's counsel's cross-examination of Goldrich. Before asking Goldrich whether he had ever personally reviewed some of the documents in the transactions at issue in the present case, Kaplan's counsel asked him about his construction company and determined from Goldrich that it employs almost a thousand people and has been involved in the construction of over 20,000 apartments and homes. Apart from the failure to object to such questioning (Evid.

Code § 353), the questioning about Goldrich's company related to his business acumen and thus was relevant (Evid. Code § 210) to his understanding of sophisticated business documents.

Nor did the court err in permitting such leeway about prior business dealings during the opening statement by Kaplan's counsel. During his opening statement, Kaplan's counsel similarly noted past sophisticated real estate development projects, but he did not specifically mention the wealth of the parties.

Finally, there is little basis to claim that counsel for Kaplan revealed the wealth of the other parties to the jury, since counsel for the Breslow plaintiffs had already done that. For example, counsel for the Breslow plaintiffs had noted in his opening statement that the Snyder and Goldrich "groups" had put "millions of dollars" into the partnership at issue, and the "[b]eginning number was $25 million." And Snyder had testified on direct examination that "[w]e had advanced" $14 million for the project, and "$50 million was put into the project in equity." Thus, the Breslow plaintiffs should be hard pressed to complain about references to their financial wealth.

No reversible error by the trial court allowing argument and evidence concerning the government's investigation of purported misconduct that did not result in any criminal conviction or accusation

The Breslow plaintiffs complain that, over various objections at different times during trial, Kaplan's counsel referred to a redacted letter from the U.S. Attorney's Office (counsel for the FDIC; i.e., Independence Bank), discussing potential investigations into fraud in the procurement of the bank loan.[9] For example, at various points during the

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[9] It is undisputed that the letter introduced as exhibit No. 555 was a "redacted" version of the U.S. Attorney's letter. However, the only version of that letter before this Court is an unredacted version faxed to this Court by counsel for the Breslow plaintiffs. Apparently the faxed copy is not the redacted version that was exhibit No. 555. The selected exhibits lodged on appeal by the Breslow plaintiffs also do not contain exhibit No. 555. The party challenging the judgment, of course, has the burden of showing

trial, there was an objection on grounds of relevance that was overruled, an objection to assuming facts not in evidence that was overruled, a request to strike and to admonish the jury with a decision deferred until a request was in writing, a general and unspecified objection that was overruled, an objection based on lack of relevance to motivation with the objection sustained, and an unobjected to reference in closing argument.

The Breslow plaintiffs contend now on appeal that the admission of such evidence was highly inflammatory, irrelevant, and not proper impeachment. To the extent specific objections at trial differ from the complaints on appeal, the issue has been waived by failure to object on the grounds now complained of. (Evid. Code, § 353.)

Assuming arguendo the matters complained of are properly before us for appellate review, as noted by the Breslow plaintiffs, the conduct described in the U.S. Attorney's letter did not involve the conviction of a crime, but only alleged prior "bad acts" or misconduct. Such evidence is not admissible to impeach a witness's credibility. (Evid. Code, §§ 787, 788.) But use of the U.S. Attorney's letter was otherwise proper.

First, the evidence relating to the government's investigation was relevant to undermine the claim of the Breslow plaintiffs that they had settled in 1995 because the federal district court's ruling had convinced them that Kaplan's advice was erroneous and that he had committed legal malpractice. The letter arguably supports the alternative notion that the Breslow plaintiffs settled not because of Kaplan's purported malpractice, but to avoid further scrutiny into their business endeavors. As Snyder himself at one point acknowledged, "There were letters from the U.S. or Justice Department . . . . They were making all kinds of scary threats."

The U.S. Attorney's letter was also relevant as it pertained to the *timing* of government's inquiries in terms of the parties' decision to settle. The letter was relevant to Kaplan's statute of limitations defense because its date (January 20, 1995) tended to prove that the Breslow plaintiffs lost confidence in Kaplan's purported legal advice and

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reversible error by an adequate appellate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

stopped listening to him more than one year before they filed their lawsuit (on May 28, 1996). The letter arguably corroborated Breslow's direct testimony that mentioned the district court's ruling and that noted the Breslow plaintiffs had lost confidence in Kaplan in February of 1995, and that the loss of confidence was "dramatic," rather than over a period of time. Thus, the letter could support Kaplan's statute of limitations defense, which was presented by Kaplan's testimony and exhibits that showed he was ignored after the district court's ruling and after settlement talks began with the FDIC and Robbins.

Moreover, any improper prejudicial inference from the redacted U.S. Attorney's letter was adequately mitigated by the following instruction to the jury: "You have heard reference to criminal investigations. I instruct you as a matter of law, this case does not involve any criminal activity or investigation. I further instruct you that there is no evidence [of] any such activity by either the plaintiffs or defendant, nor is there any evidence of any investigations. [¶] You are not to speculate as to matters which are not in evidence. I instruct you that you are not to consider any matter relating to any claim of investigation in deciding any matter in this case." And the court instructed the jury not to be "influenced by sympathy, prejudice or passion."

The general rule is that juries are presumed to follow a trial court's limiting instruction. (*People v. Harris* (1981) 28 Cal.3d 935, 951; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 598.) Otherwise, there would be no point in instructing juries at all or in reversing for prejudicially erroneous instructions. (*Parker v. Randolph* (1979) 442 U.S. 62, 73.) We thus assume the jury in the present case followed the court's instruction and was not influenced by any references to criminal investigations.

Nor, in attempting to show the jury's verdict was affected by improper references to criminal investigations, may the Breslow plaintiffs rely on a posttrial affidavit of counsel that relates information from a juror. Such information cannot be relied upon, as "'a jury verdict may not be impeached by hearsay affidavits.'" (*People v. Williams* (1988) 45 Cal.3d 1268, 1318; see *People v. Manson* (1976) 61 Cal.App.3d 102, 216.)

Accordingly, even assuming arguendo error regarding admission of evidence about the U.S. Attorney's letter, it did not amount to a miscarriage of justice such as to warrant a reversal of the judgment and a new trial. (Cal. Const., art. VI, § 13.)

Other complaints of evidentiary error

Equally unavailing is the related argument that the trial court erred in preventing the Breslow plaintiffs from cross-examining Kaplan and revealing a prior inconsistent judicial admission. The judicial admission pertained to Kaplan's claim in his original complaint that there was no merit to the assertion the federal authorities intimidated the parties into accepting the 1995 settlement, and that they thus avoided substantial expense and injury to their business reputations resulting from a criminal investigation.

However, the portion of the transcript cited by the Breslow plaintiffs relates to the direct examination of Breslow. And the sidebar conference dealt with the Breslow plaintiffs' desire to examine Kaplan *in the future* regarding the number of lawsuits he had filed against them and whether he or they had filed the first one, which the trial court ruled was irrelevant. The subject of examining Kaplan about whether he thought the federal government's investigation was meritorious never came up during that discussion. The Breslow plaintiffs' claim of error is thus without foundation.

Moreover, contrary to the Breslow plaintiffs' contention, the trial court did not err in precluding evidence to impeach and rebut Kaplan's accusations. It did not improperly thwart the attempt to reveal that the reason the Breslow plaintiffs were compelled to settle was because Kaplan's legal actions and advice caused the district court to grant the preliminary injunction tying up the entire project.

According to the Breslow plaintiffs, the court prohibited them from discussing Kaplan's continued advice relating to the finding by the federal district court judge (in a decision on a preliminary injunction) that the 1992 transactions orchestrated by Kaplan appeared to be a fraud, and that such finding was what triggered the settlement. However, the trial court permitted the Breslow plaintiffs to testify that the federal district court ruling had been made and that the ruling was the reason why they settled. What the trial court precluded was evidence of the legal basis for the ruling.

The ruling was in fact mentioned several times, and the Breslow plaintiffs testified about the effect the ruling had on them and claimed they had settled because of that ruling and not because of the federal government's investigation. For example, Breslow testified that he and his partners had relied on Kaplan's advice about the sale during the FDIC litigation, but that they had a "dramatic change" in the attitude and decided to settle after a ruling in a related case. And Snyder testified that they settled because of the ruling.

Apart from whether the Breslow plaintiffs themselves and their counsel ignored the trial court's ruling and indicated the inducement to settle was because the federal judge had ruled the 1992 sale a fraud, it is significant that the federal court ruling was only in the context of a preliminary injunction. A preliminary injunction does not decide a case on the merits. (*B.W. Photo Utilities v. Republic Molding Corporation* (9th Cir. 1960) 280 F.2d 806, 807.) The federal district court thus did not determine on the merits that the 1992 sale had in fact been conducted improperly.

Accordingly, the trial court in the present case did not abuse its broad discretion in precluding evidence about the legal basis for the prior federal district court ruling. If the trial court had ruled otherwise, the issue of the federal district court ruling could have degenerated into a mini-trial on the likelihood of success of the FDIC's claim that the sale perpetrated a fraud, an analysis of certain complicated provisions of the Channel Gateway partnership, and whether the specter of fraud had motivated the settlement. The trial court thus did not abuse its broad discretion in apparently weighing probative value against prejudicial impact and thus excluding evidence of the federal court ruling. (Evid. Code, § 352; see *Akers v. Miller* (1998) 68 Cal.App.4th 1143, 1147.)

Nor is there any merit to the Breslow plaintiffs' position that we review the trial court's evidentiary ruling de novo on the theory that the ruling was so preclusive as to be tantamount to a nonsuit. We decline to do so because in view of the evidence actually presented and the ruling itself, which was not unreasonably preclusive, the situation was not tantamount to a nonsuit. (Cf. *Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 28.)

<u>It is unnecessary to review of the trial court's denial of the motions for a new trial and for judgment notwithstanding the verdict, which challenge the jury's finding of no attorney malpractice or other related causes of action, since the opening brief fails to challenge the jury's dispositive finding that the statute of limitations had run.</u>

The Breslow plaintiffs contend that the trial court abused its discretion by denying the motions for a new trial and for judgment notwithstanding the verdict. The basis for their contention on appeal is the assertion that the facts at trial demonstrated Kaplan acted as an attorney in the transactions at issue, that the opinion testimony of Kaplan and his expert witness that he only acted as a consultant and not an attorney was insufficient to support the jury's verdict that he was not acting as an attorney, and that uncontradicted facts supposedly refute Kaplan's affirmative defense that he was not acting as an attorney for Snyder.

The problem with such a contention on appeal is that the Breslow plaintiffs have failed in their opening brief to challenge the jury's other dispositive adverse finding -- that the statute of limitations barred any complaints by any of the Breslow plaintiffs regarding any actionable conduct by Kaplan. Specifically, the jury found that the statute of limitations barred any complaints about the benefit or partnership interest Kaplan obtained, or about his advice or actions regarding the transactions at issue, or the breach of any fiduciary duties, or any negligent or intentional misrepresentations by Kaplan. In other words, the jury found all the causes of action time-barred.

As Kaplan aptly states in his brief, the Breslow plaintiffs "do not claim that those verdicts are not supported by substantial evidence. . . . They have waived that ground for appeal. This Court's affirmance of the judgment based on the statute of limitations defense will obviate the need to consider their argument that the lower court should have granted their motion for judgment notwithstanding the verdict because it will be irrelevant whether [Kaplan] was acting as Snyder's lawyer. Even if he was, Snyder's [malpractice related] claims . . . are time-barred."

The Breslow plaintiffs' reply brief does not address Kaplan's claim that the statute of limitations has been waived. And their reply brief indeed contends for the first time on appeal that the trial evidence supports the assertion that their claims were not barred by the statute of limitations, and that the contrary finding by the jury was the result of allegedly improper evidentiary rulings and improper appeals to passion and prejudice (which we have previously discussed and found without merit).

It well settled, however, that an appellate court need not address claims raised by an appellant for the first time in the reply brief. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) Although Kaplan did recap his version of the evidence argued to the jury supporting its findings as to the statute of limitations bar, Kaplan was deprived of the opportunity to reply to the assertions the Breslow plaintiffs raised for the first time in their reply brief. (*Ibid*.) Significantly, the Breslow plaintiffs have not indicated any good cause justification for this court to exercise its discretion in favor of addressing an argument improperly raised by them for the first time in a reply brief. (See *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.)

Accordingly, we decline to address the Breslow plaintiffs' belated attack on the evidence supporting the jury's findings of the statute of limitations bar as a complete bar to the causes of action alleged. Since the statute of limitations is an absolute bar to all the causes of action, it is unnecessary to address other contentions. We thus decline to address contentions regarding the denial of the motions for a new trial and judgment notwithstanding the verdict, which were based on assertions that the facts at trial purportedly demonstrated that Kaplan had acted as an attorney in the transactions at issue and that he had allegedly failed to produce evidence sufficient to support the jury's verdicts finding otherwise.

The judgment following the jury's special verdicts in favor of Kaplan on the malpractice and related claims is affirmed.

III. Kaplan's appeal following the award of attorney fees and costs

Kaplan challenges the legal basis of the attorney fees award, which is subject to de novo review on appeal. (*Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 425.) Kaplan also challenges the amount of attorney fees awarded, which is reviewed for abuse of discretion. (*Mustachio v. Great Western Bank* (1996) 48

Cal.App.4th 1145, 1151.) "Absent a manifest abuse of discretion, the determination of the trial court will not be disturbed. An abuse of discretion is shown when it may be fairly said that court exceeded the bounds of reason or contravened uncontradicted evidence." (*Ibid.*)

<u>Attorney fees are permitted by contract</u>

Goldrich and Snyder rely on two contract provisions to support their request for attorney fees--one provision in the September 1992 promissory note,[10] and the other in the September 1992 assignment of limited partnership interest.[11] The trial court (Judge Michael Harwin) did not identify under which provision it awarded attorney fees. We find attorney fees are supported under attorney fees provision in the note.

The language of the 1992 promissory note permits recovery of attorney fees "with respect to collection of this Note." The relevant lawsuit was one filed by Kaplan and sought a declaration that Goldrich and Snyder could not enforce the note because it had been declared null and void in 1995, and sought an injunction against any attempted enforcement pending a determination of its validity in light of that declaration. Contrary to Kaplan's assertion, the broad "with respect to" language means not just "to" collect on the note, but anything "in relation to" collection of the note. (*People v. Hard* (2003) 112

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[10] The relevant provision in the 1992 promissory note is as follows: "If this note is not paid when due, the unpaid sum shall bear interest until paid at the maximum lawful rate until paid and the undersigned shall pay all attorney fees or court costs with respect to the collection of this Note."

[11] An indemnity clause was included in the 1992 assignment of interest to Venture by Goldrich and Snyder (the successors in interest to the Sumitomo Bank as a secured party regarding the loan to MEHP) of MEHP's limited partnership interest in Channel Gateway. The indemnity clause was as follows: "Goldrich and Snyder hereby agree to indemnify, save and hold Venture and its partners free, clear and harmless from and against any and all liabilities, loss, cost, attorneys' fees, or court costs arising out of or in connection with or relating to any challenge whether or not suit or action is instituted, to the validity, or commercial reasonableness of this Assignment."

Cal.App.4th 272, 279.) And Kaplan was one of the "undersigned" referred to in the attorney fees provision. The attorney fees provision was thus triggered by Kaplan's suit seeking, in pertinent part, a declaration and an injunction regarding the validity of the note, and the provision applies to him.

Equally unavailing is Kaplan's assertion that the Goldrich parties did not prevail on any cause of action within the scope of the note's provision. Prior to the award of attorney fees, the trial court had entered a judgment, prepared by Kaplan, which stated that he was entitled to take nothing against Goldrich or Snyder. There was no split decision. Kaplan was denied all relief on all causes of action that arose from a contract he pleaded and claimed had been breached. Since Kaplan obtained no relief and was the losing party, Goldrich and Snyder were the prevailing parties for the purposes of attorney fees.

It is thus unnecessary to address whether Goldrich and Snyder are also entitled to attorney fees under the 1992 indemnity agreement, which Kaplan characterizes as not specifically containing an attorney fees provision. And Kaplan also urges that Goldrich and Snyder did not prevail on the breach of indemnity cause of action and would not be entitled to attorney fees under the indemnity provision, even if it were construed to be an attorney fees provision.

Nor is it necessary to address the argument of Goldrich and Snyder that they are entitled to attorney fees under the theory that Kaplan is judicially estopped to argue the note and indemnity agreement do not authorize the award of attorney fees. The notion of judicial estoppel is based on Kaplan's prayer for relief in the second amended complaint, which sought attorney fees and costs pursuant to the note on all causes of action, and the allegation in one cause of action that his damages resulting from breach of the indemnity agreement included attorney fees incurred.

However, the reliance by Goldrich and Snyder on this estoppel theory is premised on dictum discussed in *International Business Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1186-1192. And this broad theory of estoppel was subsequently criticized and rejected by the same court in *M. Perez Co, Inc.. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 463-470.

Accordingly, apart from any other grounds urged, the award of attorney fees is supported by the attorney fees provision in the promissory note.

<u>The trial court did not abuse its discretion in awarding attorney fees, as it did not include any attorney fees that were not properly recoverable.</u>

As indicated in the brief statement in the Clerk's Transcript dated January 22, 2003, trial court's ruling on attorney fees was as follows: "The Court finds the fees requested to be fair and proper. The Court has stricken fees in the amount of $76.04, and grants attorney fees to defendants in the total amount of $303,172.50. Counsel for the moving party is to give notice." The notice of ruling thereafter stated, in pertinent part, that "the reasonable amount of attorneys fees incurred and awarded were $303,172.50. The court ordered that sum awarded to moving parties Goldrich and Snyder and that said sum be added to the judgment in this matter."

According to Kaplan, since the contract provision for attorney fees here specifies attorney fees "with respect to collection of this Note, "the Goldrich parties should be entitled to attorney fees only in respect to Kaplan's challenge to their attempt to enforce the note against Kaplan. Kaplan also urges that the trial court should have allocated attorney fees between those incurred by Goldrich and Snyder on this issue, and the fees incurred by the other five Breslow parties (Breslow, Kest, Swimmer, Channel Gateway and SME). Kaplan reasons that those five parties were not parties to the note, no claims under the contract were alleged against them, and thus they should not be entitled to recover any attorney fees incurred on their behalf. Kaplan's contentions are without merit.

California law is settled that an obligation to pay attorney fees incurred in the enforcement of a contract includes attorney fees incurred in defending against a challenge to the underlying validity of the obligation. (*Finalco, Inc. v. Roosevelt* (1991) 235 Cal.App.3d 1301, 1308.) And "[w]here a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under [Civil Code] section 1717 [,rendering unilateral attorney's fees provisions reciprocal,] only as they relate to the contract action." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) Nonetheless, attorney fees are recoverable on other causes of action to the extent the other causes of action or other issues therein are so """inextricably intertwined""" with the issues raised in the contract causes of action as to make apportionment of the attorney fees "'impracticable, if not impossible.'" (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.)

"Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised." (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997.) "Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co. v. Alperson*, *supra,* 25 Cal.3d at pp. 129-130.) "Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." (*Drouin* v. *Fleetwood Enterprises* (1985) 163 Cal.App.3d 486, 493.)

In the present case, in agreeing to consolidate related cases at trial, Kaplan stipulated that the case was complex and the issues intertwined. On May 3, 2000, the parties entered into an extensive stipulation that supports the award of all attorney fees evidenced by the billings presented. The stipulation, which was attached to the motion for attorney fees, established that the legal malpractice claims the Goldrich plaintiffs alleged against Kaplan were "wholly interrelated and connected to the factual allegations" in Kaplan's case. Furthermore, the parties stipulated that the "case has previously been deemed 'complex litigation'" by the superior court. This stipulation is, of course, binding on the parties. (See *County of Sacramento v. Workers' Comp. Appeals Bd.* (2000) 77 Cal.App.4th 1114, 1118-1119.)

Kaplan claims there is a substantial difference between, on the one hand, whether cases are sufficiently related in terms of factual and legal issues so as to justify consolidation and, on the other hand, whether the issues raised by contract and noncontract causes of action are so intertwined with each other that apportionment of attorney fees is impracticable. However, we find any differences between the two notions not substantial or compelling, particularly when the stipulation at issue characterizes the matters as "wholly interrelated" factually. And although complexity is not the test, when litigation is defined as "complex" and the matters are "wholly interrelated," it lends support to the conclusion that issues are "inextricably intertwined."

Here, for example, Kaplan's complaint sought to adjudicate his right not to pay on the promissory note and to enjoin performing the terms of the note, which called for foreclosure of the collateral. Kaplan's claim was based upon the same contention common to all his causes of action; i.e., that a partnership (Venture, which was not a party to the litigation) in which Kaplan had a 50% interest suffered the loss of a 15% partnership interest, and that payments made in settlement with and to the federal government by the Breslow parties constituted payments to the Breslow parties themselves.

Common to all causes of action was Kaplan's unsubstantiated claim that the payments to the federal government constituted a constructive distribution to both the Breslow parties themselves individually (resulting from full repayment of the note) and thereafter to Kaplan through his interest in Venture. Based on these allegations, *which were common to all causes of action*, Kaplan sought to enjoin enforcement of the note containing the attorney fees provision at issue here. The trial court properly found that the relevant issues were intertwined, and under such circumstances it did not abuse it discretion by not allocating fees. (See *Korech v. Hornwood* (1997) 58 Cal.App.4th 1412, 1422-1423.)

Kaplan also urges that the trial court should have awarded only 2/7ths of the fees awarded. Kaplan reasons that counsel (Friedman and his cocounsel) represented seven clients named in ten causes of action, but only two of the clients (Goldrich and Snyder) were parties to the note, only those two were named in the three relevant causes of action, and only they were entitled to recover attorney fees. Separate bills for legal services were not generated for each client, and the bills did not differentiate between clients when itemizing services.

However, there was no feasible basis for apportionment. The bulk of Kaplan's complaints charged allegations addressed to all, and the allegations were then incorporated into each cause of action. Kaplan then incorporated by reference each cause of action into each subsequent cause of action. If Goldrich and Snyder had each hired separate counsel, which they were entitled to do, each attorney would then have billed each client. The resulting fee award then would have been at least twice as large. Kaplan benefited from the economy of scale of using one attorney for all the parties because Kaplan's claims were presented against all of them. The work done for one client was done for all and at the same cost to all.

To the extent there is a problem because only Goldrich and Snyder are contractually entitled to attorney fees, it would only be an issue among those two and the other parties and not between Kaplan and anyone else. Regardless of which entity actually received the money awarded for attorney fees, Kaplan did not pay any more than he should have paid. And no other party has registered a complaint about who received the money. We also note that the notice of ruling awarding attorney fees specified that the sum awarded was "to moving parties Goldrich and Snyder," who were the two parties contractually entitled to attorney fees. The parties thus entitled to attorney fees were the parties awarded attorney fees.

Nor is there any merit to Kaplan's assertion that attorney fees should not have been awarded for work incurred before the first amended complaint, which was the first complaint to contain causes of action on the promissory note. Kaplan cites no authority for this proposition. And it is well settled that an amended complaint supersedes a prior complaint, and a prior pleading is not considered by an appellate court for any purpose other than the relation back doctrine for statute of limitations issues and the diligent prosecution statutes. (See *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215.)

Also, if we accepted Kaplan's assertion, by parity of his reasoning, amending a complaint on the day of trial to request attorney fees would purportedly deny the opposing party its reciprocal rights (Civ. Code, § 1717) to any attorney fees incurred prior to the amended complaint. Of course, such is not the case. Thus, even attorney fees incurred prior to the first amended complaint are recoverable.

Kaplan also asserts line by line that certain items claimed as part of the attorney fees consisted of work actually performed on other cases. Apart from inviting an invasion of the attorney client and work product privileges, Kaplan's mere assertions without any evidentiary support are inadequate. Similarly, there is no support for the unfounded claim that attorney fees awarded included improper claims by Robbins and Kraemer.

Equally unavailing is Kaplan's complaint about attorney fees charged for preparing and prosecuting the cross-complaint against the FDIC. Kaplan had argued that he need not pay the note because of the settlement with the United States and, on that basis, was entitled to his attorney fees when he prevailed. His complaint referenced the wrongful conduct of the United States, but failed to name it as an essential party. The trial court denied the motion to dismiss for improper joinder, but invited a joinder by cross-complaint because of doubt that the superior court had jurisdiction to compel a federal agency into the state courts. The action thus was taken in defense of Kaplan's tactics, and the attorney fees awarded were within the trial court's discretion.

Furthermore, the attorney fees incurred in connection with the rule 3-300 issues (i.e., issues regarding counsel's duty to avoid interests adverse to a client) were also recoverable. The rule 3-300 issues were both affirmative claims in the malpractice case by the Goldrich plaintiffs and affirmative defenses to several of Kaplan's causes of action in the other case. However, the work billed here was only for the work performed in defense of Kaplan's case. And to the extent Kaplan urges that winning on one theory of defense does not permit recovery of fees reasonably incurred on all defenses, such a notion is without citation to legal authority and unsupported.

Kaplan also challenges various attorney fees that he alleges were incurred on motions and discovery that purportedly were unrelated to the promissory note. Specifically, Kaplan cites the opposition to his 1999 motion for summary adjudication on the first cause of action, the opposition to his motion for leave to file a second amended complaint, the demurrer to and motion to strike the second amended complaint, the 2001 motion for summary judgment or summary adjudication, Channel Gateway's opposition to his motion to compel further responses to interrogatories, and discovery allegedly directed at other issues. However, we deem these matters as involving attorney fees wholly interrelated and connected to the contract claims and thus recoverable.

For example, regarding the opposition to Kaplan's motion for leave to file a second amended complaint, Kaplan obviously deemed the amendment necessary to enforce his rights under the promissory note, including the right to attorney fees. Similarly, it cannot reasonably be argued that the work that went into terminating Kaplan's right to claim fees was unrelated to Kaplan's fee claim. Thus, the attorney fees claimed on the successful motion for summary judgment ending Kaplan's right to claim fees are recoverable.

Also with out merit are several miscellaneous complaints about items recovered as attorney fees. Kaplan claims an "obvious billing error" for an approximately 25-hour telephone conference call. As pointed out to the trial court, however, the characterization of the hours was in error, but not the amount of time spent. The billing reflected conference calls over a several week period with an attorney (Friedman), who became permanently injured during a criminal assault but who continued to work at home. The calls were admittedly improperly recorded and entered on one time slip, though the amount of time and work spent were properly claimed.

Because of the same incident with the injured attorney, the client became concerned and elected to employ another law firm (Hennigan Bennet & Dorman) to perform some of the tasks the injured attorney was unable to perform due to his disability. There was no evidence work was duplicated. And contrary to Kaplan's claim, the law firm's work, which the injured attorney could not perform, was appropriate and properly recoverable.

Accordingly, the trial court did not abuse its broad discretion either in declining to apportion attorney fees among distinct causes of action, or in awarding the total amount of attorney fees of $303,172.50.[12] (See *Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545; *IMO Development Corp. v. Dow Corning Corp.* (1982) 135 Cal.App.3d 451, 464-465.)

The trial court's award of costs

The standard of review on issues regarding the award of costs is also abuse of discretion. (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) Whether a cost item was reasonably necessary to the litigation is question of fact for the trial court. (*Ibid.*) The trial court's decision will only be disturbed when there is no substantial evidence to support its findings, or when there has been a miscarriage of justice. (*Finney v. Gomez, supra*, 111 Cal.App.4th at p. 545.) Such was not the case here.

Kaplan argues the Breslow parties were not entitled to recover any of the referee's fees as costs, the MEHP parties were not entitled to recover any costs because the Breslow parties had reimbursed them, and the MEHP parties were not entitled to recover costs for exhibits not used at trial. Theses contentions are unavailing.

Payment of fees for the referee

Regarding the payment of fees for the referee, the fees of a referee appointed, as here, by agreement of the parties, pursuant to Code of Civil Procedure section 638, "shall be paid as agreed by the parties." (Code Civ. Proc., § 645.1, subd. (a).) However, the statutory scheme also provides that in the event of a disagreement between the parties

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[12] Indicative of the reasonableness of the attorney fees awarded, we note that Kaplan had claimed that he had incurred approximately $500,000 in attorney fees and costs on his case alone (prior to trial and any motions for summary judgment).

over the payment of the referee's fee, the court may order the parties to pay the fees of the referee "in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties." (Code Civ. Proc., § 645.1, subd. (b).)

Here, the parties agreed to the appointment of retired Justice Panelli, without any preconditions, but apparently without knowing exactly what he charged and on the assumption his hourly rates were roughly comparable to the rates charged by other private judges. JAMS subsequently advised the parties that the amount it intended to charge was $8,500 per day (or portion thereof).[13]

In a letter dated May 31, 2001, from Attorney Goldman (Kaplan's counsel) to Attorney Friedman, Goldman purportedly confirmed prior telephone conversations indicating, among other things, that Friedman's clients "would split the costs of the reference trial before Justice Panelli," that "Justice Panelli's and JAMS' fees will not be included in the costs awarded the prevailing party as the result of the outcome of the lawsuits," and that Kaplan would to pay one-third of a $500 per hour fee (or $167) and none of JAMS's administration fee. Friedman did not reply to the letter with any corrections or otherwise respond to it at all.

According to Friedman, however, the parties did not agree that none of Justice Panelli's fees would be claimed as costs. Friedman asserts that the agreement was that Kaplan would not be responsible for any costs *in addition* to the hourly rate charged by other judges on the JAMS list and that, since some of these judges did not charge the $250 set-up fee, Kaplan would not be responsible for advancing that fee.

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13 Kaplan also claims that JAMS sought a case management fee of 10% of the total fee, which worked out to be $4,250. The Breslow parties dispute this and assert that the actual case management fee was $250 for the entire case, no matter how long it was pending. The JAMS fee schedule reveals a case management fee of "$250 Per Party Per Day" if the hearing is between one to three days; if the hearing is four days or more, the fee is "10% of hearing time reserved, divided by parties according to their fee arrangement."

The bottom line is that although the parties may have originally agreed on how the referee's fees would be paid, they subsequently disagreed. The resulting dispute was settled by the court, which was authorized by statute to order the parties to pay the fees of the referee "in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties." (Code Civ. Proc., § 645.1, subd. (b).)

The trial court ordered that Kaplan and the Breslow parties each would be responsible for 50% of the total fees paid, and that Kaplan would have to reimburse the Breslow parties for the difference between that 50% and the amount they had actually paid. The trial court did not abuse its broad discretion in doing so.

<u>Costs awarded to the MEHP parties</u>

According to Kaplan, the trial court awarded the MEHP parties all the costs it claimed ($5,089.74), even though the Breslow parties had reimbursed MEHP for those amounts pursuant to the 1995 settlement agreement. Kaplan acknowledges that pursuant statute, costs can be recovered whether or not paid (Code Civ. Proc., § 1033.5, subd. (c)(1)), but urges that the statute can only apply to unreimbursed costs. Kaplan cites no authority for this proposition.

Pursuant to the collateral source rule, generally the recovery of damages suffered is not precluded nor is the amount reduced by receipt of payment for the loss from a source wholly independent of the wrongdoer. (See *Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, 349.) Even if the collateral source rule did not apply, however, any reimbursement of money from the Breslow parties to the MEHP parties is a matter between them. Kaplan has no basis to complain about such an arrangement and cannot avoid costs just because the MEHP parties might owe the amount of the costs back to the Breslow parties. Otherwise, Kaplan would gain the benefit of an indemnity agreement between the MEHP parties and the Breslow parties--an agreement to which Kaplan was not a party.

Finally, contrary to Kaplan's contention, the MEHP parties were entitled to recover the costs for exhibits even if not used at trial. Here, the case ended before trial and the trial court permitted recovery of $734.39 claimed for exhibits prepared but not used. The MEHP parties were properly awarded such costs under the statutory provision that permits recovery for "[i]tems not mentioned in this section [which] . . . may be allowed or denied in the court's discretion." (Code Civ. Proc., § 1033.5, subd. (c)(4).) The trial court did not abuse its discretion in awarding this cost item.

DISPOSITION

The judgments on the appeal following summary judgment, on the cross-appeal following trial, and on the appeal from the award of attorney fees and costs are affirmed. Goldrich and Snyder are entitled to recover from Kaplan their attorney fees and court costs on appeal with respect to collection of the 1992 promissory note, and they may do so by appropriate motion in the trial court. In all other respects, each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

NOTT, J.

DOI TODD, J.